Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Property Network Information and Other Customer Information.	))))	**CC Docket No. 96-115**

NYNEX COMMENTS

NYNEX Telephone Companies

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Dated: June 11, 1996

TABLE OF CONTENTS

PAGE

SUMMARY

NYNEX hereby responds to the Commission's May 17, 1996 Notice of Proposed Rulemaking ("NPRM") related to Section 222 of the Communications Act. Section 222, which was added to the Communications Act by Section 702 of the Telecommunications Act of 1996 (the "1996 Act"), deals with carriers' responsibility with regard to Customer Proprietary Network Information ("CPNI") and other customer information.

In its NPRM, the Commission tentatively concluded that it would be in the public interest for the Commission to adopt regulations to implement Section 222 of the Act.[1] As should be clear from the March 5, 1996, "Petition of the NYNEX Telephone Companies for a Declaratory Ruling as to the Interpretation of Section 222 of the Communications Act" ("NYNEX Petition"), NYNEX believes that it is appropriate for the Commission to adopt regulations implementing Section 222. Care must obviously be taken, however, to ensure that any implementing regulations be consistent both with Section 222 itself and with the overall policies reflected in the 1996 Act.

Part II of these comments addresses the Commission's conclusion that the Congress "sought to address both privacy and competitive concerns" by enacting Section 222.[2] While these comments agree with the NPRM that CPNI *requirements* should balance "customer privacy and competitive considerations," Section 222 makes clear that *the application of those*

[1] NPRM ¶15.

[2] Id.

requirements is imposed on all telecommunications carriers regardless of their competitive position. Given that the primary focus of those parts of Section 222 that deal with the use by carriers of CPNI of individual customers is on the privacy concerns of customers, and not on competitive concerns, it would be inappropriate to attempt to fashion differing regulatory restrictions relating to CPNI and other customer information based upon the Commission's assessment of the competitiveness of particular markets or the alleged dominance or non-dominance of individual companies in these markets.

Part III of these comments addresses the Commission's conclusions regarding the interpretation of the term "telecommunications service" as used in Section 222(c)(1). While the tripartite division suggested by the Commission is a reasonable one, including short-haul toll service within the "interexchange" category is not supported by the "traditional" division of services among carriers. In addition, as suggested in the NPRM (¶ 23), the Commission should put in place a process to re-examine its initial delineation of services in order to reflect the inevitable changes in customers' perception of carriers as markets continue to change from their heretofore "traditional" definitions.

Part IV of these comments addresses the issue of how to interpret Section 222(c)(1)(B), which allows the use of CPNI without customer approval, for "services necessary to, or used in, the provision" of the telecommunications service from which the CPNI was derived. It will be shown that the Commission should interpret this provision in a manner that will not frustrate either customers' reasonable desire of being able to engage in "one-stop shopping" or the goals of the 1996 Act of ensuring the timely and widespread delivery of

advanced telecommunications products or services. We will show that inside wire, CPE and certain types of information services clearly fall within the ambit of Section 222(c)(1)(B).

Part V of these comments addresses the issue of customer notice of their rights with regard to CPNI. The comments endorse the Commission's conclusion that it would be appropriate to require carriers to notify customers of their rights regarding CPNI.

Part VI of these comments urges the Commission to establish a system that does not prescribe or prohibit particular forms or methods of obtaining customer's approval to use CPNI.

Part VII of these comments addresses the scope of Commission authority and the question of whether, and to what extent, it would be appropriate to pre-empt state action dealing with CPNI and other customer information.

Part VIII deals with the issue of whether the Commission's existing CPNI rules should continue in force. We will show that the continuation of these rules would be contrary to the 1996 Act. In Part IX, we address other issues raised by the NPRM, including those related to subscriber lists.

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NYNEX COMMENTS

I. INTRODUCTION

The NYNEX Telephone Companies[3] ("NYNEX") hereby comment on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above docket.

The Commission's NPRM seeks comments regarding proposed regulations to implement Section 222 of the Communications Act, as added by Section 702 of the Telecommunications Act of 1996. Section 222 restricts the use of the Customer Proprietary Network Information ("CPNI") that telecommunications carriers obtain in providing

[3] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

telecommunications services. The section also imposes other requirements related to other types of customer-related data, including subscriber list information.

In considering how to implement Section 222 the Commission must remember an important point: Section 222 is part of the first substantive legislative restructuring of telecommunications regulation in more than sixty years. The overarching purposes of the Act must be kept in mind: "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[4] In the comments that follow we suggest modifications to the Commission's suggested approach that are intended to ensure that any regulations implementing the CPNI and other customer information requirements of Section 222 are not only consistent with Section 222, but also with the goals of the 1996 Act.

II. THE RELEVANCE OF COMPETITIVE ISSUES

The NPRM concludes that in enacting Section 222, Congress "sought to address both privacy and competitive concerns." (¶15.) The NPRM reflects the Commission's intent to fashion a "regulatory regime that balances consumer privacy and competitive concerns." (Id. ¶2.)[5]

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[4] Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), at 113.

[5] The Commission's perceived need to use its regulatory process to "balance" competitive and privacy concerns in implementing Section 222 is reflected in a number of proposals and conclusions made by the NPRM: e.g., (i) the suggestion that the notice and authorization requirements of carriers regarding CPNI be varied to reflect their market power and (ii) the

NYNEX agrees with the Commission's tentative conclusion that Congress intended Section 222 to address both privacy and competitive concerns and that, therefore, CPNI requirements likewise should reflect such a balance. The Joint Explanatory Statement notes that "new Section 222 strives to balance both competitive and consumer privacy interests" (p. 205). While the focus of Section 222 is on privacy considerations, it also includes ample competitive safeguards. Section 222(a) imposes requirements on every carrier to protect the information of other carriers, including that of resellers; Section 222(b) restricts the use by carriers of information obtained from another carrier and expressly prohibits the use of such information for marketing efforts; Section 222(c)(2) requires a carrier to disclose a customer's CPNI to another person, including a carrier, upon the affirmative written request of the customer; Section 222(c)(3) imposes requirements on LECs to provide aggregate CPNI to other carriers or persons; and finally, competitive concerns are clearly evident in the requirements of Section 222(e) related to subscriber list information. Thus, when we look at Section 222 as a whole it is clear competitive concerns already have been directly addressed by Congress in its formulation of the CPNI requirements.

Likewise, while Congress intended that the CPNI requirements reflect a balance of consumer privacy and competitive considerations, there is ample evidence that Congress intended that such requirements apply uniformly to carriers regardless of their competitive position. First, the plain wording of Section 222 makes clear that the CPNI requirements apply

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conclusion that the existing CPNI rules should remain in place for BOCs, should no longer be applied to AT&T and should not be extended to other carriers.

equally to all telecommunication carriers. Subdivision (a) of Section 222, which sets out the general requirements of the section, expressly states that "Every telecommunications carrier" (emphasis added) has a duty to protect the confidentiality of proprietary information (see also Joint Explanatory Statement at 205). In addition, by using the term "telecommunications carrier" throughout the remainder of Section 222, without qualification or distinction, it is clear that Congress intended to apply the same CPNI requirements to all telecommunications carriers regardless of their competitive position.[6] Indeed, the Act's definition of "telecommunication carrier" as "*any* provider of telecommunications services..."[7] supports this interpretation.

Second, the legislative history of Section 222 supports the interpretation that Congress intended to impose the same CPNI requirements on all carriers, regardless of their competitive position in the marketplace. The CPNI requirements ultimately enacted in Section 222 did not limit the imposition of such requirements to the BOCs, as originally proposed in the Senate Bill.[8] Likewise, the final version of Section 222 declined to differentiate among telecommunications carriers, for purposes of CPNI applicability, based on their size, as

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[6] This interpretation is supported by the fact that in other sections of the 1996 Act, when Congress did intend to impose particular requirements on particular carriers and not others, or to allow the statutory requirements to apply differently to reflect competitive concerns, it did so explicitly. For example, Section 151 of the 1996 Act provides special provisions (i.e., Sections 271 to 276 of the Communications Act) which deal with Bell Operating Companies. Section 251 of the Communications Act, as added by Section 101 of the 1996 Act, deals with the differing requirements related to interconnection of all telecommunication carriers, LECs as a group, and incumbent LECs. Section 251(h)(2) permits the Commission to decide to treat certain carriers as incumbent LECs.

[7] Section 3(a)(49) of the Act (emphasis added).

[8] See, e.g. Joint Explanatory Statement at 203.

had been proposed in the House amendment.[9] Thus, the delineation among carriers that the Commission appears to be contemplating in implementing Section 222, with certain CPNI requirements applying only to certain carriers, was expressly considered and rejected by Congress.

Third, as noted, the Act provides "a pro-competitive de-regulatory national policy framework." As the NPRM notes, in discussing the definition of CPNI in Section 222(f), it is obvious that the Congress was familiar with the Commission's actions regarding CPNI.[10] Given this familiarity, the absence of any indication, either in the language of the Section 222 itself or in its legislative history, to indicate a congressional intent to carry forward the sort of distinctions among carriers that the Commission made in fashioning its CPNI rules, cannot be viewed as a mere oversight by Congress. It is more reasonable to read this silence, and the decision not to impose particular requirements solely on BOCs, as indicating a congressional intent to reject the concept of imposing different requirements on different carriers.

Fourth, while competitive issues were a consideration in fashioning Section 222, customer privacy concerns clearly were paramount in establishing restrictions on the use of the CPNI for individual customers. For example, Section 702 of the 1996 Act, which added Section 222, is entitled "Privacy of Customer Information." Moreover, virtually all of the subsections of that section include the words "confidentiality" or "privacy" in their titles and/or

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[9] See, e.g., id. at 204.

[10] NPRM, ¶8, n.30.

throughout their texts. Such language clearly highlights the importance that Congress has placed on the protection, via CPNI requirements, of all customers' privacy interests. Nothing in either the 1996 Act nor its legislative history suggests, let alone states, that the Commission should be allowed the option of altering such privacy rights and protections for a customer depending upon the Commission's perception of the market power of that customer's carrier. In particular, given the importance of privacy concerns, it is difficult to imagine that Congress intended to allow the Commission to exempt AT&T and the independent LECs from certain CPNI safeguards. Why, for example, should the fact that the Commission has not adopted Computer-III CPNI requirements for independent LECs mean that customers of an independent LEC should have a lesser degree of privacy protection than customers of BOCs? Similarly, why should the FCC's recent decision to classify AT&T as non-dominant subject AT&T's customers to reduced privacy rights?

And fifth, the 1996 Act as a whole argues against any suggestion that the Commission should vary the requirements of the Act to accommodate what the Commission takes to be competitive imbalances that survived the enactment of the 1996 Act. The Act as a whole reflects the efforts of Congress to re-design the previously existing regulatory system to provide the appropriate inducements to develop a fully competitive telecommunications system. As stated in the Conference Report, the Act provides "the de-regulatory national policy framework" to provide benefits to the public "by opening all telecommunications markets to

competition."[11] In short, the Act itself provides the means to provide any equalization of the marketplace that may be necessary.

As the above illustrates, Congress did not intend to permit the Commission to apply different CPNI requirements to different carriers depending on the Commission's perception of the competitive position of such carriers. In short, the appropriate balance of competitive and privacy interests already has been fashioned by Congress. This balance has put such a premium on customers' privacy interests that it imposes the same CPNI requirements on all carriers. It would be unreasonable for the Commission to attempt to alter this balance, particularly where Congress has not envisioned allowing any role for the Commission to alter the statutory CPNI framework of applying CPNI uniformly to all telecommunications carriers.

III. DEFINITION OF TELECOMMUNICATIONS SERVICE

With certain limited exceptions, Section 222(c)(1) permits telecommunications carriers to use, disclose, or permit access to individually identifiable CPNI only in their provision of the "telecommunications service" from which such information is derived, or of certain related services, without having first obtained the customer's approval. The NPRM tentatively concludes that there are three "telecommunications services" under Section 222(c)(1)(A): (1) local (including intraLATA toll when provided by a BOC); (2) interexchange (interLATA and intraLATA toll when provided by an IXC); and (3) CMRS.[12]

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[11] Conference Report at 1.

[12] NPRM, ¶22.

While, as discussed below, NYNEX supports the Commission's decision to use "traditional service distinctions" as the basis for establishing the initial categories of telecommunication services, it believes that the treatment of short-haul toll service suggested by the NPRM should be modified. In addition, as suggested by the NPRM, the Commission should create a mechanism for review and revision of its initial division of services, as technology and the 1996 Act will rapidly change "traditional service distinctions."

a. Treatment of Short-Haul Toll

In delineating telecommunications service into three categories or "buckets," the Commission found that the division it proposes was "based on traditional service distinctions" (NPRM ¶22). The NYNEX Petition dealt with the interpretation of "telecommunications service" and urged that the Commission adopt, at least initially, an interpretation of Section 222 that recognizes two separate wireline services: interLATA services and intraLATA services, with non-wireline services as a separate category.

As suggested by the NYNEX Petition (pp. 4-6), and as recognized by the NPRM (¶ 20), neither the language of the 1996 Act nor that of the Communications Act provides clear guidance on the scope of the term "telecommunications service" as used in Section 222. However, as urged by Petition. the legislative history of Section 222 itself clearly indicates a recognition of the interLATA/intraLATA distinction and an intent to use this distinction in establishing responsibilities regarding CPNI (NYNEX Petition 6-9). Finally, in addition to being consistent with the language of the 1996 Act and being supported by legislative history, the delineation urged by the NYNEX Petition is consistent with the public policy concerns that

underlie the 1996 Act (Id. 9-11). While the tripartite division suggested by the NPRM is similar to that urged by the NYNEX Petition, it differs in its treatment of short-haul toll.[13] Under the NPRM, short-haul toll would be in both the local and interexchange "buckets."

NYNEX believes that a consideration of traditional service distinctions should lead to a conclusion that short-haul toll should be included only in the "local" bucket. Such treatment is consistent with the fact that traditionally short-haul toll has not been viewed as an interexchange service. Instead, short-haul toll service has traditionally been provided by LECs as part of their local service offerings. This fact has been recognized and relied upon by interexchange carriers in numerous state and federal regulatory proceedings in which these carriers pointed to their marginal presence in this market and argued for the need to "open up" this market through the adoption of intraLATA presubscription and other regulatory measures.[14]

The NPRM seeks comments with regard to the competitive impact of its proposed delineation of telecommunication services. (NPRM ¶25). The inclusion of short-haul toll in the

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[13] The NPRM also differs from the NYNEX Petition in its delineation of "local" and "interexchange" baskets, rather than "intraLATA" and "interLATA" baskets as proposed by NYNEX. NYNEX continues to believe that the delineation urged in its Petition more closely tracks the legislative history of Section 222, and is more consistent with the policies underlying the 1996 Act.

[14] For example, in the March 1995 Recommended Decision in Case 92-C-0665, the New York Telephone Company Incentive Regulation Plan proceeding, the Administrative Law Judges stated that "The IXCs argue that the intraLATA toll markets are virtually devoid of competition." The Recommended Decision went on to cite AT&T's claim that New York Telephone had somewhere between 97% and 98.6% of the intraLATA toll market (pp. 238-39). While NYT contended that the IXCs had not properly presented the level of their intraLATA activity, the RD found that the "intraLATA toll market is not really a competitive one" (Id. 241).

interexchange services bucket will provide interexchange carriers with a major competitive advantage vis-a-vis the BOCs. IntraLATA pre-subscription will remove the remaining regulatory barriers to the provision by interexchange carriers of intraLATA toll service, such as short-haul toll. Under the NPRM's delineation of telecommunication services, these carriers could freely use CPNI obtained in providing interLATA service as a marketing tool in pursuing the intraLATA toll market. On the other hand, when the BOCs become able to offer interLATA services, they would be precluded from using their CPNI, including CPNI gained in offering toll service, in marketing their long distance service. Thus, while the two sets of carriers will see regulatory restraints on entering particular markets lifted, the Commission's division of telecommunication services would cause BOCs to be constrained in marketing their services in the new market in a way that IXCs are not in theirs. This imbalance is compounded in jurisdictions where IXCs already offer intraLATA toll service, but BOCs do not yet have, and will not have for some time, the ability to offer long distance services. In sum, the Commission's proposed CPNI delineations essentially would give IXCs an unfair competitive advantage in entering local markets. Surely, Congress did not intend for the Commission's CPNI rules to upset the delicate competitive framework reflected in the 1996 Act's local and long distance provisions.

b. <u>The Need to Revise The Initial Delineation</u>

The NPRM suggests that there may be a need to revise the initial delineation of services to reflect changes in telecommunications technology and regulation. (NPRM ¶23). NYNEX agrees that whatever initial delineation of services is adopted should be subject to

Commission review to reflect the inevitable blurring of the "traditional service distinctions" upon which those delineations were originally premised.

The Commission's suggested basis for its proposed delineation of services, i.e., "traditional" service distinctions, while a reasonable one, is necessarily founded upon current customer perceptions. These perceptions reflect market distinctions that are based on existing technologies and past regulatory actions that served to establish geographic and other boundaries on the offerings of particular carriers. As technology continues to change and, as these boundaries disappear as a result of the 1996 Act and future regulatory decisions, it is essential that the Commission's regulations under Section 222 be revised to reflect these changes. If the regulations do not permit such revision, we are merely ensuring the continuation of the type of regulatory constraint the Act was intended to prevent, i.e., regulation that serves to constrict carriers' offerings to the public, and to artificially reward certain carriers while penalizing others. To ensure that this does not occur, NYNEX suggests that the Commission establish a concrete future point in time when it will initiate a proceeding to reevaluate its CPNI buckets to reflect the anticipated place changes in telecommunications services.

IV. "SERVICES NECESSARY TO, OR USED IN THE PROVISION OF SUCH TELECOMMUNICATIONS SERVICE"

Section 222(c)(1)(B) permits a carrier, without prior customer approval, to use CPNI derived from a telecommunications service in the provision of services "necessary to or used in the provision of such telecommunications service, including the publishing of directories." The NPRM requests comments on what services would be encompassed within this

provision.[15] Paragraph 26 of the NPRM suggests that CPE and information services are not "necessary to, or used in the provision of, such telecommunications service" and thus information obtained from the provision of any telecommunications service may not be used to market information services or CPE, without prior customer authorization. (NPRM ¶ 26.) While NYNEX agrees that the CPE and information services would not be the provision of a telecommunications service, as that term used in Section 222(c)(1)(A), the offering of CPE and other services, including information services, should be viewed as falling within the ambit of Section 222(c)(1)(B) as a service "necessary to or used in the provision" of a telecommunication service.

From a consumer's prospective, inside wire and CPE are necessary and "used" in the provision of a telecommunications service. Similarly, information services like voice messaging service are viewed by customers as services "necessary to or used" in the provision of a telecommunication service. From a customer's perspective, voice messaging permits the completion of calls that otherwise would go unanswered, and is no different from features like

[15] NPRM ¶25. The NPRM notes that Section 222(d)(1) of the Act permits carriers to use CPNI without customer consent if such use is "to initiate, render, bill, render and collect for telecommunications services." The Commission seeks comment on whether this provision would permit the use of CPNI received from the provision of one telecommunication service "to perform installation, maintenance and repair for any telecommunication services to which the customer subscribes." Alternatively, the Commission asks whether such use would fall within Section 222(c)(1)(B) (Id. ¶26). NYNEX believes that the former interpretation is preferable -- the use of the plural "services" in Section 222(d)(1) supports this interpretation. In any event, under either interpretation, carriers would be permitted to use CPNI from one telecommunications service to provide the customer with necessary support services in the provision of another telecommunications service.

Call Waiting, Caller ID, Call Forwarding, and Call Answering, which are clearly telecommunications services. All of these services are viewed by customers as part and parcel of the package of services that effectively permit customers to receive and "use" telecommunications service.

When we look at Section 222(c)(1)(B) we see that its scope is not limited to "telecommunications services." This is clear from the sole example that Congress offered of the type of services that would be encompassed within the ambit of this provision, i.e., "the publishing of directories." The provision of directories is not the provision of a telecommunication service; many carriers do not publish directories and many publishers of directories are not carriers. Certainly, a strong case can be made that if Congress viewed the offering of directories as a service "used" in the provision of a telecommunication service the same can be said with greater force for the provision of inside wire, CPE, and the offering of at least certain information services. NYNEX believes that the language of Section 222(c)(1)(B), supports a broad, flexible reading of its scope -- a reading that must be taken from a customer's perspective.

In addition, if inside wire, CPE and information services do not fall within the scope of Section 222(c)(1)(B), what, other than publishing of directories, does? The Commission cannot reduce statutory language to mere surplusage. The selection by Congress of the example of directories and its use of the use of the word "used" in Section 222(c)(1)(B) argue for a broad, common-sense reading of this provision -- a reading that would include inside wire, CPE and, at least many information services.

V. CUSTOMER NOTIFICATION OF CPNI RIGHTS

Section 222(c) permits a carrier to use individually identifiable CPNI for purposes not specified in that section "with the approval of the customer." The NPRM tentatively concludes that the Commission should require carriers to notify customers of their right to restrict access to their CPNI ((NPRM ¶25).

NYNEX believes that, while it would be appropriate for the Commission to require that all carriers give customers notice of their rights to limit the use of CPNI, the Commission should not attempt to prescribe a particular type of notice (i.e., oral or written) or to prescribe the contents of any such service. While, as a practical matter, most carriers are likely to select to provide a written notice to customers, there is no support in Section 222 or in its legislative history of any intent to prescribe or proscribe any particular method of notice.

Indeed, as the NPRM implicitly acknowledged, given the fact that neither Section 222 nor its legislative history even addressed notification of CPNI rights, in implementing that section the Commission should endeavor to permit the least burdensome method of notification necessary to inform customers of their right to restrict their CPNI. While carriers are likely to elect to provide written notice to customers, they should be allowed the freedom to determine whether such notification should be oral or written. Similarly, carriers should be given the freedom to determine the content of the notification, provided that it explicitly makes clear to customers their right to restrict their CPNI. In addition, carriers should be given the flexibility to determine how frequently to provide such notification.

VI. CUSTOMER AUTHORIZATION

Acknowledging that the 1996 Act does not address such issues, the NPRM requests comment regarding what methods carriers may use to obtain customer authorization for use of CPNI, where such authorization may be necessary. In this regard, the NPRM seeks comment on how Section 222(c)(1) should be interpreted in light of Section 222(d)(3) (NPRM ¶30). NYNEX believes that, with certain specified limitations, Congress intended to provide carriers with flexibility in how they would satisfy the requirement of obtaining customer approval for the use of CPNI. Congress clearly declined to dictate whether a customer's CPNI authorization should be oral or written. As Section 222(c)(2) (requiring a carrier to disclose a customer's CPNI to a third party "upon affirmative written request by the customer") makes clear, Congress has demonstrated its ability to specify written consent when it intended to require such a method of authorization. As a result, the fact that neither Section 222(c)(1) nor Section 222(d)(3) specifies whether the authorization ought to be oral or written clearly illustrates that Congress provided flexibility regarding the form that the authorizations should take. Such flexibility is consistent with the overall deregulatory and pro-competitive policies of the 1996 Act. While, as the NPRM notes (¶29), there may be a business risk from obtaining oral approval from customers, this is a risk that carriers should be allowed to assume.

Perhaps more significant and contrary to the assumption contained in the NPRM, nothing in either Section 222 or its legislative history indicates any congressional intent to mandate *prior* authorization, particularly for residential or small business customers. As the FCC itself has recognized, requiring prior authorization for such customers is likely to deprive

them of many of the technological advances and other benefits of one-stop shopping that the 1996 Act was intended to provide.[16]

> Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction, and in order to serve them the BOCs would have to staff their business offices with network-services-only representatives, and establish separate marketing and sales forces for enhanced services. Thus, a prior authorization rule would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers ...[17]

Moreover, a prior notification requirement will lead to customer confusion and significant carrier expense, not only for the BOCs, AT&T and GTE, but particularly for other telecommunications carriers instituting CPNI for the first time.

Customer privacy concerns do not require prior authorization. Section 222(c)(1) deals with information that has been developed as a result of an existing customer/supplier relationship. Customers with a pre-existing relationship with a business reasonably expect that the business will use the information gained in offering a particular product in offering that customer other products it may desire. These same customers would, for the most part, prefer not to be required to provide certain basic information to a business each time there is a contact

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[16] *See* House Report at 1 ("Technological advances would be more rapid and *services would be more widely available* and at lower prices if telecommunications markets were competitive rather than regulated monopolies. Consequently, the Communications Act of 1995 opens all communications services to competition. The result will be lower prices to consumers and businesses, *greater choice of services, more innovation*, a competitive edge for American businesses, and less regulation.") (emphasis added).

[17] In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, Report and Order, 6 FCC Rcd. 7571, 7610 n. 155 (1991).

with that business. In the past, the Commission has expressly recognized that customers' privacy concerns differ radically when, on the one hand, they are dealing with a business that has previously provided them with a service and, on the other hand, they are solicited by a business with whom there is no prior relationship.[18]

VII. SCOPE OF COMMISSION AUTHORITY

The Commission has sought comment on the extent to which Section 222 pre-empts state regulation of CPNI.[19] As the NPRM notes, the Ninth Circuit Court of Appeals has upheld the Commission's decision in its Computer-III proceeding to pre-empt state CPNI rules that would have imposed additional customer authorization requirements beyond those specified by the Commission.[20] In doing so, the Court found that allowing "conflicting state rules regarding access to CPNI would negate the FCC's goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers."[21]

NYNEX believes that state CPNI requirements that directly conflict with those that are adopted in this proceeding (by, for example, requiring customer approval for a use of

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[18] Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8770 ¶34 (1992) ("We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.")

[19] NPRM ¶16 to ¶19.

[20] NPRM ¶16, citing California v. F.C.C., 39 F.3d 919 (9th Cir. 1994).

[21] California v. F.C.C., 39 F.3d at 933.

CPNI where no approval is required by federal regulations) should be pre-empted. The Ninth Circuit decision recognized that requiring carriers to attempt to satisfy conflicting state CPNI rules would, as a practical matter, be impossible.

The impact of State CPNI requirements that do not conflict with those adopted in this proceeding should be assessed in a case-by-case basis. This assessment will serve to develop a record that would permit the Commission to determine whether the requirements "would negate valid FCC regulatory goals."[22]

VIII. CONTINUATION OF EXISTING CPNI RULES

The Commission has tentatively concluded that the existing CPE and Computer-III CPNI rules, which apply only to certain carriers, should continue to apply to those companies, at least during the pendency of this proceeding. In addition, the Commission request comments on whether such rules should continue thereafter. The Commission, however, tentatively concludes that AT&T should no longer be subject to Computer-III CPNI restrictions, and that it does not intend to extend these requirements to other carriers. The Commission invites comments on whether, and to what extent, any of its existing CPNI requirement should continue to apply to carriers and asks specifically whether the "competitive advantage" that led the Commission to impose these requirements on the particular carriers continues to prevail.

A review of the 1996 Act shows that the it is no longer appropriate for the Commission to continue any of its existing CPNI requirements after it adopts rules to implement

[22] California v. FCC, 905 F. 2d 1217, 1243 (9th Cir. 1990).

Section 222. By enacting Section 222 Congress has acted to regulate a field that had not been previously addressed legislatively. It did so, as recognized by the NPRM, in a manner that reflects a degree of familiarity with the Commission's previous actions in this field. Thus, as noted earlier, the NPRM recognizes that the definition of CPNI found in Section 222(f) tracks the definition developed by the Commission in its CPE and Computer-III proceedings. While the Congress decided to use the Commission's definition of CPNI in Section 222, as discussed in more detail in Part II of these comments, it clearly decided not to carry forward the notion that prevailed in the CPE and Computer-III proceedings that different carriers should be subject to different CPNI requirements based upon their size or the competitive nature of different markets. Again, in doing so, it decided to reject an approach, embodied in Section 102 of the Senate Bill, that would have imposed CPNI requirements only on BOCs, as well as an approach that would have exempted smaller carriers from CPNI requirements.

In short, the Congress has occupied the field in a manner that precludes the Commission from continuing to apply its existing CPNI rules.[23] In discussing the issue of whether to continue existing CPNI rules, the Commission stated that "nothing in the 1996 Act affects these requirements." (NPRM ¶38). NYNEX disagrees. The requirements of the existing CPNI rules of the Commission apply only to particular carriers and only with regard to the use by these carriers of CPNI in marketing certain services, i.e., CPE and enhanced services. On the

[23] In addition, as noted above, under Section 222(c)(1)(b) the provision by carriers of CPE and of at least some enhanced services, should be viewed as the offering of "services necessary or used" in the provision of a telecommunications service.

other hand, the requirements of Sections 222 explicitly apply to every carrier and deal with the use and disclosure of CPNI for any purpose and not just the marketing of CPE and enhanced services.[24] Thus, Congress has clearly affected the Commission's rules by putting in place a regime that deals with all carriers and imposes the same requirements on these carriers regarding disclosure of CPNI for any purpose.

In addition to the fact that Section 222 itself precludes differential treatment of carriers in satisfying their CPNI duties under the 1996 Act, the enactment of the 1996 Act has served to change the previously existing regulatory regime in a way that removes the predicate for the existing CPNI rules. The Commission's existing CPNI rules were, as recognized by the NPRM (¶42), adopted because the Commission perceived that certain carriers possessed a "competitive advantage" in the marketing of CPE and enhanced services because of their market power in the provision of telephone service. The 1996 Act reflects a thorough going effort by Congress to address and remove whatever competitive advantage these carriers may have had in the provision of telephone service.

The costs of continuing the existing CPNI requirements, including the requirement that mechanical safeguards be maintained by carriers, are significant. Continuing to impose these requirements on certain carriers while allowing other carriers to operate free of

[24] The difference in scope of the CPNI rules on the one hand (i.e. that they deal with the marketing of CPE and enhanced services) and Section 222 on the other (that it deals with disclosure by a carrier of CPNI for any purpose) highlights the fact the while the focus of the Commission's rules has been competitive issues, the focus of Section 222, especially of subdivision (c) of the Section, is on customer privacy concerns.